

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK
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6 DETROY LIVINGSTON,
Plaintiff

08-CV-6576(G)

7 vs.

8 JAMES ESGROW, ET AL.,
Defendant.

Rochester, New York
October 24, 2013
8:30 a.m.

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11 TRANSCRIPT OF PROCEEDINGS
12 BEFORE THE HONORABLE FRANK P. GERACI, JR.
13 UNITED STATES DISTRICT JUDGE

14 DETROY LIVINGSTON, PRO SE

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16 NYS ATTORNEY GENERAL OFFICE
17 BY: J. RICHARD BENITEZ, ESQ.
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18 Appearing on behalf of the Defendants
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Rochester, New York 14614
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I N D E X

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Charge by Judge Geraci

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Verdict

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P R O C E E D I N G S

* * *

(WHEREUPON, the jury is not present).

08:41:09AM THE COURT: Good morning. Mr. Livingston, I understand you're looking for a copy of Plaintiff's Exhibit 2?

MR. LIVINGSTON: Yes.

THE COURT: I have one here. Anything before we proceed?

MR. BENITEZ: Nothing further.

08:42:02AM THE COURT: Mr. Livingston?

MR. LIVINGSTON: No.

THE COURT: Thank you, we can bring the jury out.

(WHEREUPON, the jury is present).

08:43:19AM THE COURT: Good morning, ladies and gentlemen. Members of the jury, now that you've heard all the evidence in the case, it now becomes my duty to instruct you on the law, the rules and principles that will guide your deliberations.

In any jury trial, in effect, there are two judges. I am one of the judges, the judge of the law; and you are the other judge, the judge of the facts. Over the next several minutes I'll be reading you the law. It's important I read it to you because you have to receive it exactly as it provides.

08:44:01AM As a judge of the facts it's important that you make your determination in this case and reach your decision and follow your sworn duty to follow the law as I instruct

1 you. You must follow all my instructions as a whole. You
2 have no right to disregard or to question the wisdom or the
3 correctness of the rules which I'm about to state to you. You
4 must not substitute or follow your own notion or opinion as to
08:44:20AM 5 what the law is or what you think it ought to be.

6 It is your duty to apply the law exactly as I give
7 it to you regardless of the consequences.

8 You are to perform your duty without bias and
9 prejudice to any party.

08:44:35AM 10 The law does not permit jurors to be governed by
11 sympathy, by prejudice, or by public opinion.

12 It is expected you will carefully and impartially
13 consider all the evidence in this case, follow the law as
14 instructed by the Court, and reach a just verdict regardless
08:44:53AM 15 of the consequences.

16 The evidence in this case consists of the sworn
17 testimony of witnesses regardless of who may have called them;
18 and all the exhibits that were received in evidence regardless
19 of who may have produced those.

08:45:08AM 20 Statements and arguments of the parties are not
21 evidence. Any evidence as to which an objection was sustained
22 by the Court and any evidence ordered stricken by the Court
23 must be disregarded by you.

24 Anything you may have seen or heard outside the
08:45:24AM 25 courtroom is not evidence and must be entirely disregarded.

1 You are to consider only the evidence in the case,
2 but in your consideration of the evidence, you are not limited
3 to the bald statements of the witnesses. In other words,
4 you're not limited solely to what you see or hear as a witness
08:45:44AM 5 testifies. You are permitted to draw from the facts which you
6 find have been proven such reasonable inferences as you feel
7 are justified in light of your experience.

8 There are two types of evidence which you may
9 properly use in deciding the fact issues in this case. One
08:46:03AM 10 type of evidence is called direct evidence. Direct evidence
11 is where a witness testifies what they saw, or heard, or
12 observed.

13 In other words, when a witness testifies about what
14 is known to them through their own knowledge by virtue of
08:46:19AM 15 their own senses, what they see, feel, touch or hear, that's
16 called direct evidence.

17 Circumstantial evidence is evidence which tends to
18 prove a disputed fact by proof of other facts.

19 There's a simple example of circumstantial evidence
08:46:36AM 20 which is often used. Assume when you came into the courthouse
21 this morning the sun was shining and it was a nice day. As
22 you were sitting here someone walked in with an umbrella which
23 was dripping wet, someone else walked in with a raincoat which
24 was also dripping wet. Now, you cannot look outside of the
08:46:54AM 25 courtroom, and you cannot see whether or not it is raining so

1 you have no direct evidence of that fact.

2 However, based on the combination of facts which I
3 have asked you to assume, it would be reasonable and logical
4 for you to conclude that it had been raining. That's all
08:47:10AM 5 there is to circumstantial evidence.

6 You infer on the basis of reason and experience and
7 common sense from an established fact the existence or the
8 non-existence of some other fact.

9 Circumstantial evidence is of no less value than
08:47:26AM 10 direct evidence. For it is a general rule that the law makes
11 no distinction between direct and circumstantial evidence.

12 Nor is a greater degree of certainty required of
13 circumstantial evidence than direct evidence. You should
14 weigh all the evidence in the case, direct and circumstantial,
08:47:43AM 15 in deciding the fact issues in this case. If a party asks a
16 witness a question which contains an assertion of fact, you
17 may not consider the assertion as evidence of that fact.

18 The parties' statements are not evidence whether
19 the statements are made during opening or closing or during
08:48:05AM 20 the case.

21 If any reference by the Court or by the parties to
22 matters of evidence does not coincide with your recollection,
23 it is your recollection which should control during your
24 deliberations.

08:48:19AM 25 During the course of the trial I may have

1 occasionally asked questions of witnesses in order to bring
2 out facts not then fully covered in the testimony. Do not
3 assume that I hold any opinion as to the matters to which my
4 questions may have been addressed or related. In short, you
08:48:35AM 5 should not view anything that the Court did or said as any
6 indication that I have any opinion on a fact issue in this
7 case. It is your province to decide the issues in this case
8 and not the Court's.

9 As you know, the defendant has proceeded -- excuse
08:48:52AM 10 me. The plaintiff has proceeded pro se in this case, which
11 means he's proceeding without the assistance of counsel,
12 representing himself. That is his right. And that should in
13 no way have any effect on your determination of the issues in
14 this case.

08:49:12AM 15 It's the duty of a party on each side of the case
16 to object when the other side offers testimony or other
17 evidence which that party believes is not properly admissible.
18 You should not show prejudice against a party because that
19 party made objections. Upon allowing testimony or other
08:49:29AM 20 evidence to be introduced over the objections of a party, the
21 Court does not, unless expressly stated, indicate any opinion
22 as to the weight or effect of such evidence.

23 As stated before, you are the sole judges of the
24 credibility of all witnesses and the weight and the effect of
08:49:47AM 25 all evidence.

1 When the Court has sustained an objection to a
2 question addressed to a witness, then the jury must disregard
3 the question entirely. You may draw no inference from the
4 wording of it or speculate as to what the witness would have
08:50:02AM 5 said if they had been permitted to answer the question.

6 When we began this trial I did advise you, members
7 of the jury, that the plaintiff is in custody. Again, that
8 fact has nothing to do with the merits of this case and you're
9 not to speculate regarding his custodial status or let that in
08:50:26AM 10 any way affect your determination.

11 This is a civil case, and as such the plaintiff has
12 the burden of proving the material allegations of his
13 complaint by a fair preponderance of the evidence.

14 If after considering all the evidence you are
08:50:39AM 15 satisfied that the plaintiff has carried his burden on each
16 essential point as to the burden of proof, then you must find
17 for the plaintiff on his claim. If after such consideration
18 you find the testimony of both parties to be balanced or
19 equally probable, then the plaintiff has failed to sustain his
08:51:00AM 20 burden and you must find for the defendant.

21 The party with the burden of proof on any issue has
22 the burden of proving every disputed element of his claim by a
23 preponderance of the evidence. If you conclude that the party
24 bearing the burden of proof has failed to establish his claim
08:51:19AM 25 by a preponderance of the evidence, then you must decide

1 against him on the issue you are considering. What does a
2 preponderance of the evidence mean? To establish a fact by a
3 preponderance of the evidence means to prove that a fact is
4 more likely true than not true.

08:51:38AM 5 A preponderance of the evidence means the greater
6 weight of the evidence, it refers to the quality and the
7 persuasiveness of the evidence. Not the number of witnesses
8 or the number of documents. In determining whether a claim
9 has been proven by a preponderance of the evidence, you may
08:51:55AM 10 consider the relevant testimony of all witnesses regardless of
11 who may have called them, and all the relevant exhibits
12 received in evidence regardless of who may have produced
13 those.

14 If you find that the credible evidence on a given
08:52:12AM 15 issue is evenly divided between the parties, it is equally
16 probable that one side is right as it is that the other side
17 is right, then you must decide that issue against the party
18 having this burden of proof.

19 That is because the party bearing this burden must
08:52:28AM 20 prove more than simple equality of evidence, must prove that
21 element at the time by a preponderance of the evidence.

22 On the other hand, the party with the burden of
23 proof need prove no more than a preponderance of the evidence,
24 as long as you find that the scales tip, however slightly in
08:52:47AM 25 favor of the party with this burden of proof, that what the

1 party claims is more likely true than not true, then the
2 element will have been proven by a preponderance of the
3 evidence.

4 Some of you may have heard the term "beyond a
08:53:04AM 5 reasonable doubt," which is the proper standard of proof in a
6 criminal trial. That requirement does not apply in a civil
7 case such as this and you should put that particular standard
8 out of your mind.

9 Now, I want to talk about witnesses and how to
08:53:19AM 10 evaluate their testimony. It must be clear to you by now that
11 you are being called to resolve various factual issues raised
12 by the parties in light of very different pictures painted by
13 both sides. You must determine these issues, and in doing
14 that you will have to determine what witnesses to believe. In
08:53:41AM 15 other words, you are the judges or determiners of the
16 believability or credibility of the witnesses.

17 You must determine what weight to give to the
18 testimony of each witness. You have the right to accept any
19 witness' testimony completely or to reject it completely; you
08:53:57AM 20 may accept a witness' testimony in part and reject it in part.
21 How do you determine whether the -- where the truth lies and
22 whether to credit a witness' testimony?

23 You should use all the tests for truthfulness that
24 you would use in determining matters of importance to you in
08:54:16AM 25 your every day life. You should carefully scrutinize all the

1 testimony given, the circumstances under which a witness
2 testified, and every matter in evidence which tends to show
3 whether a witness is worthy of belief.

4 Consider the witness' intelligence, state of mind,
08:54:33AM 5 demeanor, manner while testifying on the witness stand.

6 How did the witness appear? What was their
7 demeanor? That is, their behavior, manner and appearance
8 while testifying. Consider the witness' ability to observe
9 the matters as to which the witness testified. Consider
08:54:53AM 10 whether the witness had an accurate recollection of the
11 matters in question.

12 Consider the opportunity the witness had to see,
13 hear or know the things about which they testified. The
14 accuracy of their memory, their candor or lack of candor and
08:55:09AM 15 the reasonableness and probability of their testimony and its
16 consistency or lack of consistency in its corroboration or
17 lack of corroboration with other credible testimony.

18 You may also consider the motive that a witness has
19 to testify. You may consider the relation any witness may
08:55:29AM 20 bear to either side of the case, the witnesses in the outcome
21 of the case and the manner in which the witness might be
22 affected by the verdict.

23 You may consider any bias or hostility the witness
24 may have shown for any party or against any party. In other
08:55:46AM 25 words, what you must try to do in deciding credibility is size

1 up the witness in light of all the factors I've just mentioned
2 and in light of your common sense, your good judgment and your
3 own life experience and determine whether the witness is
4 worthy of belief.

08:56:03AM 5 Inconsistencies and discrepancies in the testimony
6 of a witness or between the testimony of different witnesses
7 may or may not cause a jury to discredit such testimony. Two
8 or more persons witnessing an incident or transaction may see
9 or hear it differently. An innocent misrecollection, like
08:56:22AM 10 failure to recall, is not an uncommon experience. In weighing
11 the effect of a discrepancy, always consider whether it
12 pertains to a matter of importance or an unimportant detail
13 and whether the discrepancy results from innocent error or
14 intentional falsehood.

08:56:40AM 15 After making this judgment, you will give the
16 testimony of each witness such credibility that you feel it
17 deserves.

18 You may have heard testimony that a witness made a
19 statement on an earlier occasion which the party argues is
08:56:54AM 20 inconsistent with the witness' trial testimony.

21 Of course, you must determine if the prior
22 statement is truly inconsistent. In general, evidence of a
23 prior inconsistent statement was placed before you for the
24 limited purpose of helping you decide whether to believe the
08:57:12AM 25 trial testimony of the witness who contradicted themselves.

1 If you find that the witness made an earlier
2 statement that conflicts with their trial testimony, you may
3 consider that fact in deciding how much of their testimony, if
4 any, to believe.

08:57:31AM 5 The law does not require the parties to call as
6 witnesses all persons who may have been present at any time or
7 place involved in the case or may appear to have some
8 knowledge of the matters in issue at this trial.

9 Nor does the law require the parties to produce all
08:57:48AM 10 the exhibits, all papers, and all things mentioned in the
11 evidence. However, judging the credibility of the witnesses
12 who have testified and in considering the weight and the
13 effect of all the evidence that has been produced, the jury
14 may consider the party's failure to call other witnesses or
08:58:05AM 15 produce other evidence in the case to be in existence and
16 available.

17 In this particular case, members of the jury, the
18 plaintiff has testified that he was attempting to appeal
19 various issues related to a criminal conviction. The
08:58:26AM 20 underlying basis of those criminal acts are irrelevant to your
21 determination here and you're not to let it in any way effect
22 your determination. You may consider the interest or lack of
23 interest of any witness in the outcome of the case, the bias
24 or prejudice of a witness if there's any, the appearance,
08:58:47AM 25 manner in which the witness gives their testimony, the

1 opportunity the witness had to observe the facts concerning
2 about which they testified, the probability or improbability
3 of the witness' testimony in view, in light of all the
4 evidence in the case. These are all items that you should
08:59:05AM 5 take into consideration in determining the weight, if any,
6 that you will assign to a witness' testimony.

7 In connection with your evaluation of the
8 credibility of the witnesses, you should specifically consider
9 evidence of resentment or anger which some witnesses may have
08:59:23AM 10 toward a party or that a witness may have against another
11 witness.

12 Evidence that a witness is biased, prejudiced or
13 hostile toward a party requires you to view that witness'
14 testimony with caution, to weigh it with care and subject it
08:59:38AM 15 to close and searching scrutiny.

16 At this time I'm going to turn to the cause of
17 action in this case. There's one cause of action that the
18 plaintiff alleges the law to be applied in this case. It is a
19 federal civil rights law which provides a remedy for
09:00:08AM 20 individuals who have been deprived of their constitutional
21 rights under color of state law.

22 Section 1983 of Title 42 of the United States Code
23 provides as follows: Every person, who under color of any
24 statute, ordinance, regulation, custom or usage of any state
09:00:30AM 25 or territory or the District of Columbia, subjects or causes

1 to be subjected any citizen of the United States or other
2 person within the jurisdiction thereof to the deprivation of
3 any rights, privileges or immunities secured by the
4 Constitution and laws shall be subject -- shall be liable to
09:00:53AM 5 the party injured in an action at law, suit in equity, or
6 other proper proceedings for redress.

7 Section 1983 creates a federal remedy for persons
8 who have been deprived by state officials of rights,
9 privileges and immunity secured by the United States
09:01:14AM 10 Constitution and federal statutes.

11 The plaintiff has the burden of proving each
12 essential element of a 1983 claim by a preponderance of the
13 evidence. To prove an assertion by a preponderance of the
14 evidence means proving that it is more likely true than not
09:01:32AM 15 true. If you find that any of the essential elements of the
16 plaintiff's 1983 claim has not been proven by a preponderance
17 of the evidence, then you must return a verdict for the
18 defendant.

19 To establish a claim under Section 1983, the
09:01:49AM 20 plaintiff must establish by a preponderance of the evidence
21 the following elements.

22 First, that the acts complained of were committed
23 by the defendant acting under color of state law.

24 Two, that in committing these acts the defendant
09:02:07AM 25 intentionally or recklessly deprived the plaintiff of rights,

1 privileges or opportunities secured by the Constitution or
2 laws of the United States.

3 Three, that the defendant's acts were the proximate
4 cause of the injuries sustained by the plaintiff.

09:02:26AM 5 Now, we'll examine each of these elements in
6 detail. The first element of the plaintiff's claim that the
7 conduct complained of was committed by the defendant acting
8 under color of state law. "Actions under color of state law"
9 means that the defendant claims to be acting pursuant to
09:02:45AM 10 authority given them by the state even if he is misusing that
11 authority.

12 The term "state" here also encompasses any
13 political subdivision of the state, such as a county or city
14 or any other state, county or city agencies.

09:03:02AM 15 Whether the plaintiff -- defendant, I'm sorry,
16 committed the acts alleged by the plaintiff is a question of
17 fact for you the jury to decide.

18 Assuming that the defendant did commit those acts,
19 I instruct you that since the defendant purported to be taking
09:03:19AM 20 those acts in capacity as an official of the State of New York
21 at the time of the acts in question, the defendant here was
22 acting under color of state law.

23 The second element of the plaintiff's claim is that
24 the defendant in committing the acts complained of
09:03:34AM 25 intentionally or recklessly deprived the plaintiff of a

1 federal right. In order for the plaintiff to establish this
2 second element, he must show that those acts that you have
3 found the defendant to, under color of state law, caused the
4 plaintiff to suffer the loss of a federal right and that in
09:03:54AM 5 performing those acts the defendant acted with an intent to
6 deprive the plaintiff of his rights, or the reckless disregard
7 of those rights.

8 To prove the second element of this claim the
9 plaintiff must not only show that the defendant's act deprived
09:04:10AM 10 the plaintiff of a federal right, but also that the defendant
11 took those acts with the intent to deprive the plaintiff of
12 his rights or the reckless indifference to those rights. An
13 act is intentional if it is done voluntarily and deliberately
14 and not because of mistake, accident, negligence, or some
09:04:32AM 15 other innocent reason.

16 Please note that intent can be proved directly or
17 it can be proved by reasonable inference from circumstantial
18 evidence.

19 An act is reckless if done in conscious disregard
09:04:47AM 20 of its known probable consequences. In other words, even if
21 the defendant did not intentionally seek to deprive the
22 plaintiff of the plaintiff's rights, if nevertheless they
23 purposefully disregarded the high probability that their
24 actions would deprive the plaintiff of the plaintiff's rights
09:05:03AM 25 then the second element would be satisfied.

1 The third element which the plaintiff must prove is
2 that the defendant's acts were the proximate cause of injuries
3 sustained by the plaintiff. An act is the proximate cause of
4 an injury if it was a substantial factor in bringing about
09:05:21AM 5 that injury, if the injury was a reasonably foreseeable
6 consequence of the defendant's acts.

7 In this case the defendant, excuse me, the
8 plaintiff alleges a denial of his access to the courts. The
9 plaintiff has the burden to prove that the acts of the
09:05:40AM 10 defendant Renee Gates deprived him of particular rights under
11 the United States Constitution. In this case the plaintiff
12 alleges that the defendant deprived him of his rights under
13 the First Amendment to the Constitution; under the First
14 Amendment a citizen has a right to access to the courts.

09:06:01AM 15 To succeed in his claim of denial of access to the
16 courts, plaintiff must prove each of the following elements by
17 a preponderance of the evidence.

18 One, that the defendant Renee Gates did deprive him
19 of access to the courts by intentionally holding back his
09:06:20AM 20 legal mail.

21 An act is intentional if it is done voluntarily and
22 deliberately and not because of a mistake, accident,
23 negligence or other innocent reason.

24 Please note that intent can be proved directly or
09:06:34AM 25 can be proved by reasonable inference from circumstantial

1 evidence.

2 Two, that the defendant Renee Gates acted under
3 color of law. By this I mean a person performs or claims to
4 perform official duties under any state, county or municipal
09:06:52AM 5 law, ordinance or regulation.

6 Three, that the defendant Renee Gates' conduct
7 hindered the plaintiff's efforts to pursue a meritorious legal
8 claim.

9 Four, the case which the plaintiff wanted to bring
09:07:09AM 10 to court was not frivolous. A claim is frivolous if it is so
11 trivial that there is no chance it would succeed in court or
12 be settled out of court after it was filed.

13 And five, that the plaintiff was harmed by the
14 defendant Renee Gates' conduct.

09:07:27AM 15 If you find that the plaintiff has proved each of
16 these elements by a preponderance of the evidence, then you
17 should find for the plaintiff and go on to consider the
18 question of damages.

19 If, on the other hand, you find that the plaintiff
09:07:42AM 20 has failed to prove any one of these elements by a
21 preponderance of the evidence, then you should find for the
22 defendant and you will not then consider the issue in question
23 of damages.

24 I will now charge you on the law of damages.

09:08:03AM 25 My charge to you on the law of damages must not be

1 taken as an indication that you should find for the plaintiff.
2 It is for you to decide on the evidence presented based on the
3 rules of law that I provided to you whether the plaintiff is
4 entitled to recover from the defendant.

09:08:22AM 5 If you decide that the plaintiff is not entitled to
6 recover, then you need go no further. Only if you decide that
7 the plaintiff is entitled will you consider the measure of
8 damages.

9 If you find that the plaintiff is entitled to
09:08:37AM 10 recover, you have in your discretion to award either nominal
11 or compensatory damages or combination of these damages.

12 Again, please keep in mind, any damage you may
13 award must be proximately caused by the conduct charged
14 against the defendant.

09:08:55AM 15 To say that the defendant's conduct was the
16 proximate cause of the plaintiff's injury is to say that the
17 injuries to the plaintiff followed naturally and directly from
18 the defendant's conduct.

19 The plaintiff has the burden on this issue to show
09:09:09AM 20 by a preponderance of the evidence that there was a causal
21 link or relationship between the defendant's conduct and his
22 damages.

23 Keep in mind that the damage award must be just and
24 reasonable and must not be excessive nor inadequate.

09:09:26AM 25 Damages must be reasonable. If you should find

1 that the plaintiff is entitled to a verdict, you may award him
2 only such damages as will reasonably compensate him for such
3 injury and damages you find from a preponderance of the
4 evidence in the case that he has sustained as a proximate
09:09:47AM 5 result of the incident.

6 You are not permitted to award speculative damages.
7 Therefore, you're not to include in any verdict compensation
8 for any prospective loss if it's not reasonable to occur in
9 the future.

09:10:13AM 10 In order to recover compensatory damages, the
11 plaintiff must prove by a preponderance of the evidence that
12 the damages in question resulted from the wrongful conduct of
13 the defendant. In other words, the plaintiff must first prove
14 by a preponderance of the evidence that the plaintiff actually
09:10:30AM 15 suffered those damages.

16 Plaintiff must also prove by a preponderance of the
17 evidence that the defendant's wrongful conduct was the cause
18 of those damages.

19 You may award compensatory damages for any
09:10:43AM 20 emotional distress, pain and suffering, inconvenience, mental
21 anguish, embarrassment, humiliation, or reputation suffered by
22 the plaintiff as a result of wrongful conduct by the
23 defendants.

24 If, however, you find that the plaintiff suffered
09:11:01AM 25 anguish, stress or other injuries, you may not award

1 compensatory damages if you find that the plaintiff would have
2 still suffered those damages even if the defendant had not
3 committed any wrongful act.

09:11:16AM 4 In other words, if you find that some factor other
5 than the defendant's conduct was the cause of an injury to the
6 plaintiff, then you may not award such damages to the
7 plaintiff in this case.

8 In determining the amount of any compensatory
9 damages that you decide to award, it should be decided solely
09:11:32AM 10 by the evidence and your common sense.

11 The law does not require the plaintiff prove the
12 amount of loss with mathematical precision. No evidence of
13 monetary value of such intangible things as pain and suffering
14 has been or need be introduced into evidence in the trial.
09:11:50AM 15 There's no exact method for determining the amount of these
16 damages. However, compensatory damages need not be based on
17 guesswork or sympathy; you must base it on the evidence
18 presented at trial and only that evidence. Plaintiff has the
19 burden of proving any compensatory damages by a preponderance
09:12:10AM 20 of the evidence.

21 Nominal damages are awarded when a plaintiff has
22 been deprived by a defendant of a constitutional right, but
23 has suffered no actual damage as a natural consequence of that
24 deprivation.

09:12:25AM 25 The mere fact that a constitutional deprivation

1 occurred as an injury to the person entitled to enjoy that
2 right, even when no actual damages flow from the deprivation.

3 Therefore, if you find that the plaintiff has
4 suffered no actual injury as a result of the defendant's
09:12:42AM 5 conduct, other than the fact of a constitutional deprivation,
6 then you will award nominal damages not to exceed \$1.

7 You will soon return to the jury room to decide
8 this case. In order to prevail the plaintiff must sustain his
9 burden of proof as I have just explained to you with respect
09:13:16AM 10 to each element of the cause of action. If you find that the
11 plaintiff has succeeded, you should return a verdict in his
12 favor.

13 If you find the plaintiff has failed to sustain the
14 burden on any element of the claim, then you should return a
09:13:30AM 15 verdict against the plaintiff.

16 It is your duty as jurors to consult with one
17 another, to deliberate with a view toward reaching an
18 agreement. Each of you must decide the case for yourselves,
19 but only after you had an opportunity to consider the case
09:13:47AM 20 with your fellow jurors and you should not hesitate to change
21 your opinion if convinced it is erroneous.

22 Your verdict must be unanimous. But you're not
23 bound to surrender your honest convictions concerning the
24 weight and the effect of the evidence for the mere purpose of
09:14:04AM 25 returning a verdict or solely because of the opinion of other

1 jurors.

2 Discuss and weigh your respective opinions
3 dispassionately without regard to sympathy, without regard to
4 prejudice or favor for either party and adopt that conclusion
09:14:20AM 5 which in your good conscience appears to be in accordance with
6 the truth. Again, every one of you must make your own
7 decision about the proper outcome of this case based upon your
8 consideration of the evidence and your discussions with the
9 other jurors.

09:14:35AM 10 No juror should surrender their conscientious
11 belief solely for the purpose of returning a unanimous
12 verdict. It is your duty to try the issues fairly and
13 impartially. Your final determination of facts must be based
14 only on the evidence. Each of you is entitled to your own
09:14:54AM 15 opinion, but you're required to exchange views with each
16 other.

17 That obviously is the purpose of jury
18 deliberations, to discuss and consider the evidence, listen to
19 the arguments and the reasons of your fellow jurors and to
09:15:08AM 20 present your own individual point of view and reach an
21 agreement if you solely and only on the evidence can do so
22 without violence to your own individual judgment.

23 If by chance you have a point of view that does not
24 agree with one of the other jurors, if you are persuaded that
09:15:25AM 25 the other point of view is justified based on the evidence,

1 there's no reason why you should hesitate to change your
2 judgment accordingly. But, again, no juror should give up
3 their judgment unless they are satisfied that the indicated
4 result was required under the evidence and under the
09:15:44AM 5 instructions of the law that I provided to you.

6 Your verdict must be based solely on the evidence
7 or the lack of evidence. It would be improper for you to
8 consider any personal feelings you may have about one of the
9 parties, about anybody's race, religion, national origin, sex,
09:16:02AM 10 or age.

11 It would be equally improper for you to allow any
12 feelings you have about the nature of the claim against the
13 defendant to influence you in any way.

14 Both parties in this case are entitled to a trial
09:16:16AM 15 free from prejudice. Our judicial system cannot work unless
16 you reach a verdict through fair and impartial consideration
17 of the evidence.

18 There are a few remaining rules which you must
19 observe during your deliberation. While you're here in the
09:16:33AM 20 courthouse deliberating, you will be kept together in the jury
21 room. You may not leave the jury room during deliberations.
22 If you have any cell phones or any other electronic devices,
23 they will be collected by the court security officer to hold
24 for you while you're engaged in deliberations.

09:16:51AM 25 You must deliberate about the case only when you

1 are all gathered together in the jury room. You must not, for
2 example, be discussing the case as you go to and from the
3 courtroom.

4 It's important that each juror have the opportunity
09:17:04AM 5 to hear whatever another juror has to say about the case. And
6 that by law must only be done when you're all gathered
7 together in the jury room.

8 Thus, if for any reason you're not gathered
9 together in the jury room, you must stop deliberations until
09:17:20AM 10 you're all present in the jury room.

11 During your deliberations you must discuss the case
12 only among yourselves. You must not discuss the case with
13 anybody else or permit anyone other than the fellow jurors to
14 discuss the case in your presence.

09:17:37AM 15 If you have a question, you must communicate with
16 me in writing. We will provide you with sheets for that
17 purpose. The law requires that you communicate with me in
18 writing in order to make sure there's no misunderstandings
19 about your communication.

09:17:54AM 20 I don't think anybody's taken notes, but any notes
21 that you did take are for your own aid in refreshing your own
22 independent recollection.

23 Those jurors who choose not to take notes must rely
24 on their own independent recollection, must not be influenced
09:18:12AM 25 by the notes of other jurors. Any notes you take are for your

1 own personal use in refreshing your recollection.

2 Your notes are not a substitute for the recorded
3 transcript of the testimony. Any discrepancy between your
4 recollection and your notes, you should ask to have the
09:18:27AM 5 relevant testimony read back to you. As you can see, we have
6 a professional court reporter who is taking down everything
7 that's said during the course of this trial. If you need any
8 testimony read back, that can be done.

9 In addition, your notes are not a substitute for
09:18:40AM 10 the detailed explanation of law I provided to you today. If
11 there's any discrepancy between your notes and your
12 recollection, simply ask and I'll explain those principles to
13 you.

14 Any notes you do take are confidential; they will
09:18:54AM 15 not be available for inspection or review by any party. And
16 after a jury has rendered its verdict, the notes will be
17 collected and they will be destroyed.

18 You're about to go into the jury room and begin
19 your deliberations. If during the deliberations you want to
09:19:09AM 20 see any of the exhibits that were received in evidence, you
21 may request those and they will be brought to you in the jury
22 room.

23 If you want any testimony read back to you, you may
24 also request that, but please remember it's not always easy to
09:19:23AM 25 locate what you might want, so be as specific as possible so

1 that in your request we can easily find the testimony you are
2 requesting.

3 Your request for exhibits or testimony, in fact,
4 any communication with the Court, again, must be made in
09:19:40AM 5 writing, signed by the foreperson, provided to the court
6 security officer and then it will provided to the Court.

7 In any event, if you have to communicate with the
8 Court and ask any questions, do not in that note indicate the
9 status of your deliberations. Simply ask your question.

09:19:59AM 10 Under our law, the first juror selected is known as
11 the foreperson during deliberations. The foreperson's opinion
12 and vote are not entitled to any more importance than that of
13 any other juror. What we ask the foreperson to do during
14 deliberations is to sign any written notes that the jury sends
09:20:15AM 15 to the Court; the foreperson's signature indicates that the
16 writing does come from the jury.

17 The foreperson may also chair the jury's
18 discussions during deliberations. When the jury has reached a
19 verdict, the jury will be brought back into the courtroom, and
09:20:32AM 20 the foreperson will be asked to render the verdict in open
21 court. Thereafter, the entire jury will be asked whether or
22 not that is, in fact, their verdict and they will have to
23 answer either yes or no.

24 Finally, upon the request of any party, each juror
09:20:49AM 25 will be asked individually whether the announced verdict is

1 the verdict of that juror and then upon being asked, each
2 juror will need to respond yes or no.

3 Juror number 1, then you will serve as the
4 foreperson of the jury since you were the first person that
09:21:05AM 5 was called and sworn.

6 After you've reached a verdict, the foreperson will
7 fill in the verdict form which I will provide to you, sign it,
8 date it, advise the court security officer outside that you're
9 ready to return to the courtroom. I stress that each of you
09:21:21AM 10 should be in agreement with the verdict which will be
11 announced in court. Once your verdict is announced by the
12 foreperson in open court and officially recorded, it cannot
13 ordinarily be revoked.

14 I have prepared a verdict sheet for your
09:21:37AM 15 consideration. It will outline for you the options you have
16 during your deliberations.

17 If you have any questions regarding the verdict
18 sheet, simply ask and I'll respond to that question.

19 Parties approach side bar, please.

09:21:56AM 20 (**WHEREUPON**, a discussion was held at side bar out
21 of the hearing of the jury.)

22 **THE COURT:** That's the verdict sheet. Do you have
23 any exceptions or requests? We'll review this later.

24 **MR. BENITEZ:** I have no exceptions, Judge.

09:22:24AM 25 **THE COURT:** Do you have any exceptions or requests?

1 **MR. LIVINGSTON:** I didn't -- I might have missed
2 something. Did you instruct on punitive damage.

3 **THE COURT:** No, I denied punitive damages.

4 **MR. LIVINGSTON:** Oh, okay.

09:22:38AM 5 **THE COURT:** I didn't think there was sufficient
6 evidence to instruct them on punitive damages.

7 **MR. LIVINGSTON:** Oh.

8 **THE COURT:** I'll give you a chance to review that.
9 Do you have any other exceptions or requests?

09:22:48AM 10 **MR. LIVINGSTON:** No.

11 (WHEREUPON, side bar discussion concluded.)

12 **THE COURT:** At this time the courtroom deputy will
13 swear in the court security officer.

14 (WHEREUPON, the marshal was administered the oath).

09:23:09AM 15 **THE COURT:** Members of the jury, at this time I'm
16 about to submit this case to you for your final determination.
17 As I previously stated, the law and your oath require that you
18 render a verdict that will be fair and impartial without fear,
19 favor or sympathy. Now, take this case in the fulfillment of
09:23:44AM 20 your oath in accordance with the instructions I provided to
21 you a true and impartial verdict render.

22 The jury may step down and begin your final
23 deliberations.

24 (WHEREUPON, the jury was excused at 9:23 a.m.)

09:24:02AM 25 **THE COURT:** At side bar counsel indicated they had

1 no objection to the verdict sheet. That will be marked as
2 Court Exhibit 1 and provided to the jury.

3 At this time I would like to review the exhibits,
4 make sure that we have all the right exhibits as received. I
09:24:47AM 5 have as received Plaintiff's Exhibits 1, 2, 4, 5, 6, 8, 9A,
6 9B, 9C, 10, 16, 18, 20, 21 and 22; is that right,
7 Mr. Livingston?

8 **MR. LIVINGSTON:** Yes.

9 **THE COURT:** Okay. Mr. Benitez?

09:25:32AM 10 **MR. BENITEZ:** Yes, that's correct.

11 **THE COURT:** Okay. Regarding the defendant's
12 exhibits, I believe Exhibit 408 was the only one that was
13 received.

14 **MR. BENITEZ:** Yes, that's correct.

09:25:42AM 15 **THE COURT:** Is that right?

16 **MR. LIVINGSTON:** Yes.

17 **THE COURT:** Any objection to providing the exhibits
18 to the jury without reassembling the parties if they request
19 them?

09:25:49AM 20 **MR. LIVINGSTON:** No, no objection.

21 **THE COURT:** Any objection?

22 **MR. BENITEZ:** None.

23 **THE COURT:** Okay. At this point the verdict sheet
24 has been marked as Court Exhibit 1. It will be provided to
09:26:01AM 25 the jury. Upon their request the exhibits will also be

1 provided to them. So at this time we'll stand in recess.

2 **MR. BENITEZ:** Thank you, Judge.

3 (**WHEREUPON**, there was a pause in the proceeding.)

4 **THE COURT:** We do have a verdict from the jury. The

10:39:08AM 5 Court did receive the verdict form to review it, I noticed

6 what was missing was one other question, was your verdict

7 unanimous? So I need to send it back in and make sure the

8 jury answers that particular question. So I think we can hang

9 tight, I'll have the clerk present it to the courtroom deputy

10:39:28AM 10 who will then give it to the court security officer.

11 For the record, I simply added on the verdict

12 sheet: Was your verdict unanimous with a question mark, yes

13 or no. And the jury has now responded to that.

14 So at this time we'll bring the jury back to take

10:42:53AM 15 the verdict.

16 (**WHEREUPON**, the jury is present).

17 **THE COURT:** The jury indicated they have reached a

18 verdict. The clerk will provide the foreperson with the

19 verdict.

10:44:22AM 20 I'd ask the foreperson, please rise as the

21 courtroom deputy will ask you what your verdict was.

22 **THE CLERK:** Do you find by a preponderance of the

23 evidence that defendant Renee Gates intentionally violated

24 plaintiff Detroy Livingston's right to access to the Court?

10:44:40AM 25 **JURY FOREMAN:** No.

1 **THE CLERK:** Were defendant Renee Gates' actions the
2 proximate cause of damages sustained by the plaintiff Detroy
3 Livingston?

4 **JURY FOREMAN:** No.

10:44:48AM 5 **THE CLERK:** Was your verdict unanimous?

6 **JURY FOREMAN:** Yes.

7 **THE COURT:** Thank you. You may be seated. All of
8 the members of the jury, you heard the foreperson announce
9 your verdict to the Court. Was that in all respects your
10 verdict?
10:45:04AM

11 **JURY FOREMAN:** Yes.

12 **THE COURT:** Jurors have indicated that is. Either
13 party asking for a polling of the jury?

14 Mr. Livingston?

10:45:13AM 15 **MR. LIVINGSTON:** No.

16 **THE COURT:** Mr. Benitez?

17 **MR. BENITEZ:** No.

18 **THE COURT:** Okay. Members of the jury, at this time
19 I want to thank you for the attention and the care you've
10:45:19AM 20 given to this case. As I indicated when you were selected, we
21 cannot function in this system without individuals such as you
22 willing to put aside your personal and professional time to
23 serve as jurors.

24 Please know that the law of jealously guards the
10:45:34AM 25 secrecy of your deliberations, what you said, what the other

1 jurors said, what you decided may remain locked in that
2 secrecy.

3 What that means is basically that you need not
4 answer to anybody about what your verdict is. If you want to
10:45:46AM 5 talk about the case once the verdict has been rendered, you're
6 free to do that, but nobody can make you do that. That's
7 entirely within your control.

8 Please go with the full knowledge that you
9 fulfilled your responsibility as jurors. At this time the
10:45:59AM 10 jury may step down and I'll come back and talk to you in a few
11 minutes. You may step down at this time.

12 (WHEREUPON, the jury was excused).

13 **THE COURT:** At this time the Court will enter the
14 verdict of no cause against the defendant Renee Gates. I want
10:46:37AM 15 to thank everybody for their cooperation throughout this
16 trial.

17 Mr. Livingston, do you want to say something?

18 **MR. LIVINGSTON:** Yeah, would this be the
19 appropriate time for a directed verdict despite judgment?

10:46:53AM 20 **THE COURT:** Go ahead, sure.

21 **MR. LIVINGSTON:** I think I proved my point to show
22 cause and I like to move for a directed verdict on -- from you
23 notwithstanding the verdict.

24 **THE COURT:** Okay. Mr. Benitez?

10:47:13AM 25 **MR. BENITEZ:** Basically I oppose that motion,

1 Judge, on the same grounds that I had provided to the Court on
2 my Rule 50 motion on those three bases. One, that there was a
3 lack of personal involvement.

4 That there was an insufficient amount of facts to
10:47:29AM 5 support any finding in favor of the plaintiff regarding the
6 elements in this case.

7 And as to qualified immunity -- that the jury's
8 verdict was supported by the credible evidence and proof in
9 this case, Your Honor. Therefore, I respectfully request that
10:47:48AM 10 the plaintiff's application be denied.

11 **THE COURT:** Yes, the motion to set aside the verdict
12 is denied. The Court does find that there was sufficient
13 evidence before the jury for their determination on issues of
14 fact and the application of law for the verdict that they
10:48:08AM 15 rendered and, therefore, the Court declines to set aside that
16 verdict.

17 Okay, thank you. Anything else either party wanted
18 to say?

19 **MR. LIVINGSTON:** No.

10:48:16AM 20 **MR. BENITEZ:** Nothing further.

21 **THE COURT:** I wish everybody good luck. I know
22 everybody's got difficult jobs in these facilities, so I wish
23 you the best.

24 Mr. Livingston, you did a very good job in
10:48:28AM 25 presenting your case. Obviously the purpose of these trials

1 is to give individuals an opportunity to present their case to
2 a jury, which you were able to do. You took full advantage of
3 that and I think you did a good job as a pro se litigant.

4 Hopefully, you can use your skills in the proper
10:48:47AM 5 way so that when you're ultimately released to the community,
6 you can be a productive member. I think if you use your
7 intelligence as you have in this court, there's no reason why
8 that can't be the case.

9 **MR. LIVINGSTON:** Okay, thanks.

10:48:58AM 10 **THE COURT:** Good luck to all of you as well. Thank
11 you.

12 (**WHEREUPON**, the proceedings adjourned at 10:49 a.m.)

13 * * *

14 **CERTIFICATE OF REPORTER**

15
16 In accordance with 28, U.S.C., 753(b), I certify that
17 these original notes are a true and correct record of
18 proceedings in the United States District Court for the
19 Western District of New York before the Honorable Frank P.
20 Geraci, Jr. on October 24th, 2013.

21
22 S/ Christi A. Macri

23 Christi A. Macri, FAPR-RMR-CRR-CRI
24 Official Court Reporter
25